Supreme Court, U.S.
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No. 98-1306

In The

Supreme Court of the United States

October Term, 1998

MENOMINEE INDIAN TRIBE OF WISCONSIN,

Petitioner,

v.

TOMMY G. THOMPSON, Governor of the State of Wisconsin; GEORGE E. MEYER, Secretary, Wisconsin Department of Natural Resources; JAMES T. ADDIS, Administrator, DNR Division of Resource Management; JOHN E. FRYATT, Administrator, DNR Division of Enforcement; HERBERT F. BEHNKE, TRYGBE A. SOLBERG, NEAL W. SCHNEIDER, BETTY JO NELSEN, MARY JANE NELSON, JAMES E. TIEFENTHALER, JR., and STEPHEN D. WILLETT, Members, Wisconsin Natural Resources Board,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION

788

JAMES E. DOYLE
Attorney General

CHARLES D. HOORNSTRA
Assistant Attorneys General
State Bar No. 1010601
Counsel of Record

THOMAS DOSCH
JOHN NIEMISTO
PHILIP PETERSON
Assistant Attorneys General

Attorneys for Respondents

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-9945

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Pursuant to Rule 15.8 of this Court, Respondents respectfully submit this supplemental brief in opposition to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

On March 24, 1999, which was subsequent to respondents' brief in opposition, the Court decided Minnesota v. Mille Lacs Band of Chippewa Indians, __U.S.__, No. 97-1337 (March 24, 1999). Petitioner's reply to the brief in opposition relied heavily on that decision.

This supplemental brief is confined to the Mille Lacs decision and petitioner's comments on it.

ARGUMENT

MILLE LACS SUPPORTS THE DECISION BELOW AND WARRANTS NEITHER A SUMMARY REVERSAL OR REMAND

The Menominee argue that Mille Lacs vindicates its position that a treaty rights case cannot be decided on treaty language alone, but requires a full record that takes into account all the historical circumstances and upholds the Indians' interpretation. To the contrary, Mille Lacs supports the decisions below.

Petitioner completely misses the pivotal point in Mille Lacs. Distinguishing Oregon Department of Fish & Wildlife v. Klamath Indian Tribe, 473 U.S. 753 (1985), the Court said:

> Klamath does not control this case. First, the Chippewa's usufructuray rights under the 1837 Treaty existed independently of land ownershp; they were neither tied to a reservation nor exclusive. In contrast to

> *Klamath*, there is no background understanding of the rights to suggest that they are extinguished when title to the land is extinguished. Without this background understanding, there is no reason to believe that the Chippewa would have understood a cession of a particular tract of land to relinquish hunting and fishing privileges on another tract of land.

Slip op. 28 (emphasis added). In other words, as stated in respondents' brief in opposition, petitioner wholly fails to deal with the apples-oranges difference in the two cases. "[A]ny possible holding in Mille Lacs that the 1855 treaty did not extinguish reserved rights on a different parcel of land could not affect the issue in this case whether cession of title in a removal treaty terminated title-dependent rights on the same parcel." Br. in opp. at 26.

The Court further explained the difference between the non-dependent Chippewa reserved rights and title-dependent rights. Unlike the treaty right in Ward v. Race Horse, 163 U.S. 504 (1896), "the 1837 [Chippewa] Treaty does not tie the duration of the rights to the occurrence of some clearly contemplated event." Slip op. 34. As seen, the 1831 Menominee treaty does. Here, as in Race Horse, there was a "fixed termination point;" the treaty "contemplated that the rights would continue only so long as the hunting grounds remained unoccupied and owned;" "the happening of these conditions was 'clearly contemplated' when the Treaty was ratified." Slip op. 34 (internal citations omitted).

Contrary to petitioner's suggestion, nowhere did this Court repudiate its holdings that unambiguous treaty language controls. See citations, br. in opp. at 19 n.19. Rather, Mille Lacs simply applied the general rule requiring express language of termination of earlier reserved rights, absent which outside evidence is needed. See Mattz v. Arnett, 412 U.S. 481, 505 (1973) (an intent to terminate

"must be expressed on the face of the Act ***or*** be clear from surrounding circumstances and legislative history") (emphasis added). This rule is inapplicable here, of course, because the 1836 and 1848 treaties merely were the extinguishing events expressly contemplated in the 1831 treaty.

Moreover, apart from the 1836 and 1848 treaties as satisfying the title-contingency of the 1831 rights, Mille Lacs confirms that their removal nature independently extinguished those rights. The Court did so in holding that President Taylor's revocation of use rights necessarily was but a part of the removal objective. Slip op. 18-21. The duty to remove and a claimed reserved right to fish are mutually exclusive. Critically, unlike the removal order in Mille Lacs, the petitioner does not challenge the validity of the treaty-based removal obligation here.

Besides, the courts below ***did*** consider the historical context. The district court considered petitioner's entire array of expert opinion and historical data to assure full understanding of the tribe's position. Br. in opp. at 18 n.17. In addition, it canvassed several other contextual arguments, including the contention that the tribe was dependent on continuing use rights, App. 109-10; the historical data showing the purpose to convert the Indians into farmers, id. 110-11; that the "[h]istorical documentation submitted by" petitioner itself failed to bolster its claim that it failed to understand the limited duration of the use rights, id. 112; the claim that language barriers prevented full understanding, id. 114-15; consideration of the terms of other treaties, id. 117; the tribe's historical proffer that the rights were not title-dependent but only an unexercised option to take, id. 118-20; the effect of the government's representations during treaty negotiations, id. 122; the fact that the tribe continued to hunt and fish, id. 123, 125; tribal understanding of the duty to remove in the 1848 treaty, id. 126, 128-29; tribal understanding in the post-treaty years, id. 131-32, 136-40;

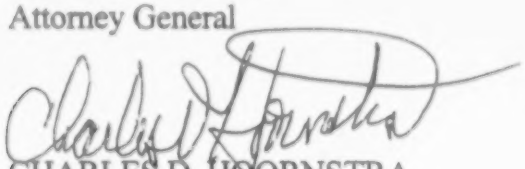
and the undisputed historical evidence that the 1831 surveying contingency was met, id. 151. Also note the consideration of the 1851 commissioner's report regarding duration after the 1848 treaty. Br. in opp. at 15-16 n.16.

The court of appeals likewise viewed the language in its historical context, not solely in isolation. It considered the historical record of tribal understanding after the 1848 treaty, App. at 18; that the government's express purpose in 1831 was to encourage the Menominee to become farmers and to use the land for settlement, id. at 21; and that because of "this historical context" the court "[could] not ignore plain language." Id.

In sum, the Menominee are blocked by the plain language of the treaties both when standing alone and also when considered in their historical context.

Respectfully submitted,

JAMES E. DOYLE
Attorney General



CHARLES D. HOORNSTRA
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